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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 16-CM-123

Appeal No. 2017AP12CR

JESSE U. FELBAB,

Defendant-Appellant.

Brief of Jesse U. Felbab Concerning the Judgment of Conviction and Order Denying Motion to Suppress Entered By Winnebago County Circuit Court, The Honorable Thomas J. Gritton

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STATEMENT OF ISSUES

Did the Trial Court fail to properly exercise its discretion when it allowed additional testimony concerning Mr. Felbab's motion to suppress?

Answer: Not answered by Trial Court

Did the Trial Court err in ultimately denying Mr. Felbab's Motion to Suppress?

Answer: Not answered by Trial Court

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As the facts of the case are straight forward and well documented, and given the law applicable to the issues at hand is long-standing and unambiguous, appellant does not believe oral argument is necessary.

Moreover, appellant does not expect the Appellate Court's ruling will require explanation, modification, or rejection of existing law or policy, and therefore, appellant does not believe the Appellate Court's ruling merits publication.

STATEMENT OF CASE

On January 26, 2016, a criminal complaint was filed in Winnebago County as Case No. 16-CM-123, charging Mr. Felbab with one count of Possession of THC and one count of Possession of Drug Paraphernalia (R-1).

At the initial appearance held on February 23, 2016, Mr. Felbab entered a not guilty plea to the charges (R-27).

On March 17, 2016, Mr. Felbab filed a Motion to Suppress Evidence. The motion sought suppression of evidence obtained by law enforcement during a traffic stop conducted on December 4, 2015. Mr. Felbab was the operator of the vehicle that was stopped. It was the evidence seized during this traffic stop which lead to the charges in this case. In his motion, Mr. Felbab argued the traffic stop was either unreasonably long for its purpose, or the traffic stop was improperly expanded beyond the scope of the initial inquiry/stop (R-4).

A motion hearing was held on April 6, 2016.

At the motion hearing on April 6, 2016, the officer who stopped Mr. Felbab testified. Deputy Schoonover described his observations of the vehicle prior to conducting a stop. The officer first observed a headlight was out as the suspect vehicle passed him (R-29, Page 4, Lines 19-25 and Page 5, Lines 1-2). The officer observed the vehicle was traveling between 50-60 MPH in a 65 MPH zone (R-29, Page 5, Lines 7-12); the vehicle turned on a turn signal and then turned it off (R-29, Page 5,

Lines 12-17). And the vehicle traveled onto the shoulder of the road (R-29, Page 5, Lines 17-20).

There was a limited amount of testimony about the actual traffic stop. Deputy Schoonover described approaching the Felbab vehicle, speaking to Mr. Felbab, obtaining identification, and returning to his patrol car (R-29, Pages 7-11).

At the conclusion of the April 6, 2016 hearing, Judge Gritton indicated he wanted to review pertinent case law before rendering a decision (R-29, Page 31). The case was adjourned to April 13, 2016. On April 13, 2016, Judge Gritton asked the parties a question – which party had the burden to prove how long the traffic stop took and if the length of the stop was reasonable (r-29, Page 32). Judge Gritton concluded the State had the burden to prove these matters (R-29, Pages 33-34). With that in mind, Judge Gritton found the record was not adequate to explain how long this particular traffic stop took (or for that matter how long traffic ticket stops routinely take). As a result, Judge Gritton concluded the State failed to meet its burden, and, therefore, granted Mr. Felbab's motion to suppress (R-29, Pages 32-35) and Appendix - 1.

It should be noted that prior to the hearing on April 13, 2016, Judge Gritton met with the attorneys in chambers off the record. During the conference, there was apparently a discussion that the party who was on the losing end of the motion would be given some time to consider asking the Trial Court to revisit the issue. While this conversation was not put on the record, it was referred to subsequently by the Trial Court and the parties (R-8, 30 and 32). Nevertheless, it is unclear

precisely what was said by the Trial Court or the attorneys during this conference.

Having lost the motion to suppress, the State sought to reopen the issue to offer more testimony. Ultimately, the Trial Court allowed the State to do so.

A supplemental hearing was conducted on July 5, 2016.

At the supplemental hearing, the State presented further testimony from Deputy Schoonover. This testimony related to how long the stop did take, as well as how the stop was extended in time to allow other officers to arrive at the scene so Deputy Schoonover could perform field sobriety tests on Mr. Felbab and conduct a K-9 dog sniff of the vehicle Mr. Felbab was operating (R-32, Pages 7-25).

After listening to the additional testimony about how long the stop took, Judge Gritton found the duration of the stop was reasonable, as the deputy diligently investigated the matter. Judge Gritton also found the evidence established the deputy had a reasonable suspicion to expand the original purpose for the stop to include an impaired driver investigation. Based on the supplemental evidence on the timing and expansion of the stop, Judge Gritton reversed his earlier ruling and denied the motion to suppress (R-32, Pages 32-38) and Appendix - 2.

ARGUMENT

I. THE TRIAL COURT COMMITTED ERROR BY ALLOWING THE STATE TO PROVIDE ADDITIONAL EVIDENCE REGARDING HOW THE TRAFFIC STOP WAS EXTENDED IN TIME TO ALLOW OTHER OFFICERS TO ARRIVE SO FIELD SOBRIETY TESTS COULD BE ADMINISTERED AND A K-9 DOG SNIFF COULD BE PERFORMED.

The power to reopen a matter for additional testimony lies within the sound discretion of the trial court. **Estate of Javornik**, 35 Wis. 2d 741, 151 N.W. 2d 721 (1967) and **Stivarius v. DiVall**, 121 Wis. 2d 145, 358 N.W. 2d 530 (1984).

On appeal, the exercise of discretion will not be reversed unless the trial court erred in exercising its discretion. **Hull v. State Farm Mut. Auto Ins. Co.**, 222 Wis. 2d 627, 586 N.W. 2d 863 (1998). An erroneous exercise of discretion occurs if the trial court applies the wrong law, the trial court does not consider the facts of record under the relevant law, or the trial court does not reason its way to a rationale conclusion. **State v. Davis,** 2001 WI 136, 637 N.W. 2d 62.

Mr. Felbab contends the Trial Court did not explain on the record its reasoning or rationale for re-opening the suppression motion to consider additional testimony. As a result, the Trial Court failed to properly exercise its discretion.

At the motion hearing on April 6, 2016, Judge Gritton did not rule on the motion and made no mention of the possibility of allowing additional testimony. At the end of this hearing, Judge Gritton simply stated:

> THE COURT: It has been a while since I have read the **Young** case and the **Kolstad** case. I would like to at least review those so I'm going to adjourn a week and we'll come back with my decision (R-29, Page 31).

At the hearing held a week later (on April 13, 2016), Judge Gritton made the following statement:

> We did talk in chambers about some of the other options here and I guess, Mr. Prekop, you have to decide if you wish to pursue this further with any motions (R-29, Pages 34-35).

There is nothing in the record from the April 13, 2016 hearing to make clear what those options were or why they might be considered by the Trial Court.

Then on June 16, 2016, Judge Gritton addressed directly the issue of allowing more testimony in relation to the traffic stop, stating:

> THE COURT: I read the memo. I know how I ruled last time but I know I made it also very clear that I was willing to take more evidence into the record, and even though I don't like the fact that it was late, I understand Mr. Prekop's explanation here so what I'm going to do is I am going to

> allow for an additional hearing to finish the testimony.
>
> I just think from a judicial efficiency standpoint, it makes sense. And what I'll do – a half hour should be more than enough, correct? (R-31, Pages 2-3).

A trial court properly exercises its discretion when it considers the facts of record and reasons its way to a rational, legally sound conclusion. **McCleary v. State**, 49 Wis. 2d 263, 182 N.W. 2d 512 (1971). It is a process of reasoning put on the record to demonstrate consideration of the facts and law in reaching a reasoned conclusion. **Burkes v. Hale**, 165 Wis. 2d 585, 478 N.W. 2d 37 (1991). On review, the appellate court looks to the record for the courts explanation to be sure the court's exercise of discretion meets these standards, **Burke**, supra at 590.

Mr. Felbab argues the record is insufficient to find Judge Gritton properly exercised his discretion to reopen the issue of the traffic stop. There is no mention of the facts or circumstances which warranted reopening the matter, such as a witness was unavailable, or there was insufficient time to complete the testimony on April 6, 2016. There is no mention of the factors (for and against) which the Trial Court considered when deciding whether or not to re-open the matter, such as the potential prejudice to the defendant, the need for decisions to be final, and so on. And there is no mention of the precise statutory or case law relevant to this issue.

As Judge Gritton did not place on the record an adequate explanation of the reasoning and rationale behind

his decision to allow additional testimony, the decision to re-open is flawed. The additional testimony should not have been allowed by the Trial Court based on this record.

On this issue, Mr. Felbab believes the cause should be remanded to the Trial Court with instructions to exercise its discretion consistent with any order from the Court of Appeals. **State v. Young**, 2006 WI 98, 294 Wis. 2d 1, 717 N.W.2d 207.

II. THE TRIAL COURT INCORRECTLY RULED THE TIME TAKEN TO CONDUCT THE TRAFFIC STOP, INCLUDING THE TIME WAITING FOR BACK-UP OFFICERS TO ARRIVE SO SOBRIETY TEST COULD BE ADMINISTERED AND/OR A K-9 DRUG SNIFF PERFORMED, WAS REASONABLE, AND AS A CONSEQUENCE, THE TRAFFIC STOP WAS LEGAL.

A. As Judge Gritton's Decision to Allow Additional Testimony is Flawed, the Additional Evidence Concerning the Length of Stop Should Not Be Considered, and as a Result, the Motion to Suppress Should Have Been Granted.

The appellate courts utilize a two-step process to review motions to suppress. **State v. Hess**, 2010 WI 82. First, the findings of fact are upheld unless they are clearly erroneous. Second, the principles of law are applied independent of the trial Court. **Hess**, supra.

For the reasons stated above, Mr. Felbab believes the ruling to allow additional evidence about the duration of the stop is clearly erroneous. Therefore, the additional evidence presented during the supplemental hearing held on July 5, 2016 should not be considered when ruling on the motion to suppress. When one considers only the evidence presented at the first motion hearing (and not the additional testimony presented on July 5, 2016), one is obliged to conclude that the State failed to establish whether or not the length of the stop of the Felbab vehicle was reasonable.

At the April 6, 2016 hearing, Deputy Schoonover provided a good deal of testimony about the facts and circumstances leading up to the traffic stop. The deputy observed the Felbab vehicle pass his squad car on Highway 10 (R-29, Pages 4-5). The Felbab vehicle had a headlight which was out (R-29, Page 5, Lines 1-4). The deputy followed the vehicle and made several observations concerning the speed and operation of the vehicle (R-29, Pages 6-7). Ultimately, the Felbab vehicle was stopped (R-29, Page 7, Lines 2-5).

Deputy Schoonover then testified concerning his interaction with Mr. Felbab during the traffic stop. This testimony described the traffic stop up to the point when the deputy decided to call for back up (R-29, Pages 7-13).

Importantly, Deputy Schoonover did not offer any testimony about how long this portion of the traffic stop occurred. He described the steps taken approaching the vehicle, interacting with Mr. Felbab and the passenger, and then returning to his squad car. However, the deputy did not indicate if this process took five minutes or fifty minutes.

Moreover, the deputy did not offer any testimony about how long this type of traffic stop normally takes.

The length of a traffic stop must be reasonable. **Florida v. Royer**, 460 U.S. 491 (1983). An unreasonably prolonged detention violates the Fourth Amendment of the United States Constitution. The detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. **Royer** at 500.

From this record, Mr. Felbab maintains one cannot fairly determine how long the traffic stop took. Without any testimony from Deputy Schoonover about the amount of time he spent approaching the vehicle, speaking to Mr. Felbab and the passenger, and returning to his vehicle, one can only speculate as to the duration of time to conduct the stop. Furthermore, there was no testimony about the amount of time typically taken for a traffic ticket stop, so one has no basis for comparing the time taken for this stop to the time normally taken to issue a citation.

Given the record from the April 6, 2016 hearing, Mr. Felbab argues Judge Gritton correctly concluded the State failed to offer sufficient proof as to the timing of the stop. The initial decision by Judge Gritton to grant the motion to suppress was correct. The Court of Appeals should affirm this earlier ruling of the Trial Court.

B. The Purpose Of The Stop Was For A Traffic Violation and There Was Not Sufficient Proof To Warrant Expanding The Stop To Administer Field

Sobriety Tests or Perform A K-9 Drug Sniff as Part of An Impaired Driver Investigation.

As defense counsel has consistently argued, the initial purpose for the traffic stop was for an ordinance violation – broken headlight and/or speeding.

As such, the stop should have involved the officer approaching the Felbab vehicle, obtaining Mr. Felbab's driver's license and insurance information, returning to the squad car, preparing a citation or warning, and delivering the ticket/warning to Mr. Felbab.

At the April 6 and April 13, 2016 hearings, Judge Gritton does not make a formal finding as to the initial purpose for the stop. As mentioned above, on April 6, 2016, at the conclusion of the testimony, Judge Gritton did not make any factual findings, but instead indicated he intended to review the pertinent case law again and render a decision on the motion at a later date (R-29, Page 31, Lines 6-9). On that later date (April 13, 2016), Judge Gritton does not make a finding as to the initial purpose for the stop. Rather, Judge Gritton grants the motion because the State did not offer sufficient proof of the duration of the stop (R-29, Lines 33-34).

Finally, on July 5, 2016, at the supplemental hearing, Judge Gritton makes a finding as to the initial purpose for the stop. In particular, he concludes:

> The case that I've been reviewing is Blatterman, and someone provided that to me. The site is

> 362 second 138, and it goes through a series of steps when you go through an investigation – investigatory detention an officer to defend it. The first is whether or not there was reasonable suspicion to be able to do the original stop … and so that's speeding and there's a headlight. So under those circumstances clearly the officer in my opinion, had the right to stop this vehicle. So I have no problem with the stopping of the vehicle. (R32, Page 32, Lines 7-14 and Page 33, Lines 4-9).

In Mr. Felbab's mind, the Trial Court agreed with defense counsel as to the initial purpose of the stop.

Mr. Felbab argues the record does not support a finding that as the stop transpired, additional facts occurred which warranted an expansion of the stop.

If, during a valid traffic stop, the officer becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense separate and distinct from the acts that prompted the stop, then the stop may be extended for a new investigation. **State v. Betow**, 226 Wis. 2d 90, 593 N.W. 2d 499 (Ct. App. 1999).

For a temporary investigative detention to be justified by reasonable suspicion, an officer must have more than an inchoate and unparticularized suspicion or hunch, **State v. Post**, 2007 WI 60, 301 Wis. 2d 1, 733 N.W. 2d 634; rather, an officer must possess specific and articulable facts which,

taken together with rational inferences from those facts, warrant a reasonable belief that the person being stopped has committed, is committing, or is about to commit an offense. **Post**, supra. In determining whether a police officer had reasonable suspicion, appellate courts must consider what a reasonable officer would have reasonably suspected given his or her training and experience. **State v. Waldner**, 206 Wis. 2d 51, 556 N.W. 2d 681 (1996).

In determining if the record supports a finding of a reasonable suspicion, appellate court considers the totality of the facts taken together. **Waldner**, supra. As facts accumulate, reasonable inferences about their cumulative effect can be down. **Waldner**, supra.

To begin with, this case does not involve a traffic stop based on a citizen complaint or call to dispatch about an impaired driver. Hence, there is no collateral evidence or information upon which Deputy Schoonover may rely on to support a reasonable suspicion of an impaired driver. **State v. McQueen**, 2009 WI App 174, 322 Wis. 2d 573, 776 N.W. 2d 287. And there is no evidence of collective knowledge other investigating officers possessed concerning this driver and vehicle which could be imputed to Deputy Schoonover. **State v. Alexander**, 2005 WI App 231, 287 Wis. 2d 645, 706 N.W. 2d 191. So the only evidence to establish a reasonable suspicion are Deputy Schoonover's observations.

Deputy Schoonover did testify as to observations he made about the speed and handling of the Felbab vehicle, which the State relied on to demonstrate a reasonable suspicion of impaired driving. When the deputy first saw the Felbab vehicle, it was traveling 50-60 miles per hour in the

right hand (slow) lane (R-29, Page 15, Lines 8-16. The posted speed limit is 65 MPH (R-29, Page 5, Line 11). The speed of the vehicle did vary somewhat. After a short while, the turn signal for the Felbab vehicle was activated, the vehicle slowed down as if preparing to turn off the highway, and then the turn signal was turned off. (R-29, Pages 17-25). A short while later, the Felbab vehicle did exit Highway 10 and turn onto Highway 45. Mr. Felbab maintains these observations, individually or collectively, are insufficient to create a reasonable suspicion of impaired driving. **State v. Post**, 2007 WI 60, 301 Wis. 2d 1, 733 N.W. 2d 634.

It is noteworthy that Deputy Schoonover confirmed during his testimony that he did not observe many common indicators of impaired driving. The deputy did not observe the vehicle cross the center line or swerving in a recurring S-pattern (R-29, Page 16, Lines 18-23), he did not observe a delay in Mr. Felbab pulling over when the deputy activated his emergency lights (R-29, Page 17, Lines 9-11), and he did not observe Mr. Felbab struggle to safely pull over his vehicle on the side of the road (R-29, Page 17, Line 20).

Once the stop was initiated, Mr. Felbab maintains there were not additional facts which became known to the deputy to warrant an impaired driver investigation. Deputy Schoonover testified that when he approached the vehicle and spoke to Mr. Felbab, he made two additional observations. First, Mr. Felbab's eyes appeared to be bloodshot (as seen at night while peering into the vehicle through the passenger side window), and second it appeared Mr. Felbab had recently lit a cigarette (although the deputy did not see Mr. Felbab light the cigarette). Deputy Schoonover considers both

observations to suggest possible impairment (R-29, Page 8, Lines 1-25 and Page 9, Lines 1-4).

However, there was an overwhelming amount of information negating any suspicion of impairment. The deputy saw no evasive movements from the persons within the vehicle, Mr. Felbab had no problem finding and providing his identification, there was no smell of intoxicants, no drug paraphernalia was in plain view, Mr. Felbab's speech was not slurred, Mr. Felbab did not have droopy eyes, Mr. Felbab did not have dry mouth, and he did not appear nervous (R-29, Page 18, Lines 16-25 and Page 19, Lines 1-17).

And Mr. Felbab believes there is evidence which the deputy might have initially thought was an indicator of impaired driving that was later explained away. For example, the deputy testified that while following the Felbab vehicle, he observed the turn signal go on, stay on for a while and then go off. While not expressly saying so, the suggestion is the officer considered this an indication of possible impairment. However, upon stopping the Felbab vehicle, Deputy Schoonover learned Mr. Felbab was not from the area, and he was finding his way home to Sheboygan late at night when visibility is reduced.

Under the totality of the circumstances, Mr. Felbab maintains there was not sufficient proof at the time of the stop or later on after making contact with Mr. Felbab, to form a reasonable suspicion to expand the stop to include an impaired driver investigation.

CONCLUSION

Mr. Felbab believes the Trial Court erred in allowing additional testimony concerning the traffic stop. On this issue, case should be remanded to the Trial Court with instructions to exercise its discretion consistent with any order from the Court of Appeals.

Next, Mr. Felbab argues only the record from the April 6, 2016 hearing should be considered in reviewing the ruling on a motion to suppress. That record, Mr. Felbab maintains, is insufficient to determine if the time taken to perform this traffic stop was reasonable. Based on the record from the April 6, 2016 hearing, the motion to suppress should have been granted.

Finally, Mr. Felbab contends the record does not support a finding of a reasonable suspicion to expand the traffic stop to include an impaired driver investigation. For this reason, as well, the motion to suppress should have been granted.

Dated this _____ day of March, 2017.

_____
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APPENDIX

APPENDIX CERTIFICATION

I hereby certify that with this brief, either as a separate document or as part of this brief, is an Appendix that complies with Section 809.19(2)(a) and that contains: (1) a table of contents; (2) relevant trial court entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the Record.

Dated this ____ day of March, 2017.

_____

Attorney Daniel R. Goggin II

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced using the following font:

> Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum 60 characters per full line of body text. The length of this brief is 4,636 words.

Dated this _____ day of March, 2017.

_____
Attorney Daniel R. Goggin II

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this _____ day of March, 2017.

_____
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